IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

FREEDOM FROM RELIGION FOUNDATION, INC., and JANE DOE, individually, and on behalf of JAMIE DOE,	:	CIVIL ACTION NO. 1:17-cv-00642
Plaintiffs,	:	
vs.	:	
MERCER COUNTY BOARD OF EDUCATION, MERCER COUNTY SCHOOLS, and DEBORAH S. AKERS, individually and in her official capacity as Superintendent of Mercer County Schools,	:	June 19, 2017
Defendants.	:	

MOTIONS HEARING

BEFORE THE HONORABLE DAVID A. FABER
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

THE COURT: Good morning.

The case before the Court this morning is *Freedom From Religion Foundation, Incorporated* against the *Mercer County Board of Education*. This is Civil Action 1:17-642.

May I ask the attorneys to please note their appearances for the record?

MR. SCHNEIDER: Your Honor, Mark Schneider on behalf of the plaintiffs.

MR. MOORE: Kermit Moore, Your Honor, on behalf of the defendants.

MR. DOREY: David Dorey, Your Honor, on behalf of defendants.

MR. WALSH: Michael Walsh, Your Honor, on behalf of defendants.

MR. SASSER: Hiram Sasser on behalf of the defendants.

THE COURT: You can be seated.

There are a couple things I want to place on the record before we go any further.

First of all is why this case is -- this hearing is being held in Beckley instead of Bluefield. The courthouse in Bluefield that was built in 1911 is currently undergoing a rather thorough renovation, and that includes the complete redesign of the courtroom. That is on-going. I don't

expect that to be complete and a courtroom to be available in Bluefield until sometime toward the end of July. So it was not possible to hold this hearing in Bluefield where it normally would have been held.

I moved it here. This is the courtroom -- federal courtroom that's the closest to the courtroom in Bluefield. And I regret any inconvenience that may have caused anybody.

Secondly, I think it's appropriate for me to disclose on the record that my wife is a retired Mercer County schoolteacher. She hasn't been employed by the Board for years. And she does receive a modest retirement income from the state, but that won't be impacted one way or another by the result in this case. I do not see that as a conflict.

I am confident that it won't affect one way or the other my ability to sit as a fair and impartial judge in this case which I intend to do, but I felt like I should disclose that, that fact.

The first thing I want to take up, there's a motion by the plaintiffs in this case to proceed using pseudonyms and for a protective order.

Let me ask if the defendants have any objection to me granting that motion.

MR. DOREY: Your Honor, we don't object to that motion. Of course, if this case was to go forward, and we don't think that it should, we would hope that discovery

would be bifurcated so that we could assess the standing of the plaintiffs who are using pseudonyms.

I would note even in that case, the names of two of the plaintiffs are already publicly disseminated. And, so, while we would endeavor to use those pseudonyms in this case, it already is the case that those folks are known in the world.

THE COURT: All right. I'm going to grant that motion now. There's also a motion for protective order made in conjunction with the motion to proceed using a pseudonym.

Have you reviewed that protective order? Do you have any objection to it?

MR. DOREY: The Court's indulgence.

(Pause)

MR. DOREY: We have no objection to the protective order.

THE COURT: All right. I'm going to grant the motion and I will enter that -- your proposed protective order, Mr. Schneider.

Pending before the Court the, the principal motion is the motion filed by the defendants to dismiss the first amended complaint. So I'll hear from you, Mr. Dorey, on that motion.

MR. DOREY: Would you like me to come to the podium?

THE COURT: Well, I might be able to hear you better if you, if you come up there and use that microphone. I do have the benefit of an immediate transcript here, so I don't think that will be a problem. But I think it would be more helpful for you to be where you are.

MR. DOREY: Very good, Your Honor. Thanks very much.

We're here asking to dismiss the first amended complaint. We represent three of the defendants who are named in that complaint but not a fourth. The --

THE COURT: Which one do you not represent?

MR. DOREY: Rebecca Peery who is a principal of the school. We understand that she has not been served with a complaint and we don't represent her.

THE COURT: All right.

MR. DOREY: So our motion is only on behalf of the other three defendants.

THE COURT: Understood.

MR. DOREY: We have moved to dismiss the complaint in principal part because the plaintiffs who have brought that complaint don't have standing to bring it. They're not the proper people who should be bringing this complaint.

They can easily be divided into two buckets of plaintiffs. The first is the Freedom From Religion Foundation, which I would refer to as FFRF, and the Doe

plaintiffs, Jane Doe and Jamie Doe.

THE COURT: If the other plaintiffs go out, Freedom From Religion is out too; right?

MR. DOREY: That's correct.

THE COURT: They have to have a -- they have to have an individual member who is a party. Is that right?

MR. DOREY: That's correct. And Jane Doe is the only member they allege in the complaint.

THE COURT: And -- all right. Go ahead.

MR. DOREY: And the other bucket of plaintiffs are the Roes and her daughter. Those folks are in a -- are really in a different posture all together.

I would start by first addressing FFRF and the Does together because, of course, as you mentioned, Your Honor, the standing of FFRF rises or falls with the standing of Jane Doe.

The Does have never experienced the Bible curriculum of which they complain. When they filed their lawsuit, it was at least seven months into the future when they would potentially experience that curriculum. Their lawsuit is --

THE COURT: Are you familiar with *Lee* against *Weisman*, the 1992 Supreme Court case involving the prayer at a high school commencement, Mr. Dorey?

MR. DOREY: I am familiar with that, Your Honor.

THE COURT: How is that case different from the

situation you have here? There was, as I understand it, just an imminent probability that there would be a prayer at the school and the Supreme Court said that was enough. And you have the same thing pretty much here, don't you?

MR. DOREY: We don't. In the first case, there the plaintiff had already experienced the prayer of which they were complaining and were filing a lawsuit to not have to experience it again. That's not the case here. These plaintiffs have never experienced it.

Also in that case it was really an up or down binary question whether there was a prayer with which the school was involved or not. And, so, since it was very clear that a prayer was going to happen, it didn't matter what that prayer was about.

Here we have an entirely different situation where Bible classes are allowed. And, in fact, there's 50 years of precedent that says so. So really the question is not a binary one, Bible classes or not, but instead what is taught in particular Bible classes.

And given the nature of school curriculum, which is reviewed on a regular basis and changed, we can't say seven months ahead of time that someone is necessarily going to experience a curriculum in the future that they know about now.

And the reason why this is extra important has already

been demonstrated in this case because since the complaint was filed, the Bible classes of which these folks are complaining have been put on hold and actually will not come back in the form that they knew about ahead of time.

THE COURT: Okay.

MR. DOREY: So because the particular curriculum of which they're complaining doesn't exist and will not come back, it only serves to further demonstrate that the plaintiffs never had standing to begin with because when they filed suit, it was necessarily speculative what would be taught in the classes in the future.

THE COURT: Well, the, the Roe plaintiffs had been in a school and had been subjected to the, for want of a better word, misconduct that the plaintiffs are complaining about in this case, haven't they? Wouldn't that at least entitle that plaintiff to a claim for nominal damages based on what's happened in the past regardless of where we go from here?

MR. DOREY: No, Your Honor, I don't agree. These folks have asked for, first, injunctive and declaratory relief which the Roe plaintiffs are not entitled to because they never say, using very artful pleading, that they do not intend to come back to school in Mercer County.

So all that leaves is a claim for nominal damages. And there is no case law in the Fourth Circuit that would

support the notion that one can file a federal lawsuit just for nominal damages. Are we going to have a trial over six cents or a dollar? I don't think so.

There, there is no -- it doesn't meet the redressability prong of standing.

THE COURT: Is there any authority that they can't file such a claim?

MR. DOREY: There is authority outside this circuit we have cited in our pleadings especially, for example, a concurrence out of the Third Circuit in a case that actually involves FFRF as well.

The judge there, the circuit judge discussed how if you have a case from the outset that just says, "We want nominal damages," this is effectively an admission, an admission that we don't have actual damages because if we did, we would have asked for them.

And, so, what it says from the get-go is we're not injured. All we have is nominal damages. And, so, this really is just a way of asking the Court to issue a declaration that these plaintiffs were right.

But that's not the province of Federal Courts. That's not what Article III says should be the province of, of our Federal Courts. We shouldn't be spending judicial resources to effectively issue an advisory opinion about whether what happened in the past was constitutional or not when that

behavior did not, in fact, result in any injury.

It does not meet the redressability prong of the standing analysis that's been discussed by the Supreme Court in many cases going back decades, and especially recently in *Clapper*.

THE COURT: Wouldn't it be relatively easy for your client to fix this problem in a manner consistent with Supreme Court precedent? Under the *Zorach* case, the Court -- that was back in 1952 back when I was a little boy and that's been a long time ago, Mr. Dorey.

The Court held that it was permissible to have sectarian education during school hours if conducted outside the school buildings. And that -- in a recent, more recent case, our Fourth Circuit Court of Appeals held in a case coming out of South Carolina I think virtually the same thing.

Then later and much more recently in the *Good News Club* case the Supreme Court said it was permissible to have religious instruction in the schools if done after regular hours.

So the problem here is that the program as it exists, regardless of whether it's sectarian or not, doesn't match either one of those escape hatches. And if you adopt it, either one of them, you would be in the clear, wouldn't you?

MR. DOREY: There is no doubt about that, but our

client doesn't wish to offer sectarian education. Our client wishes to offer education about the Bible in the context of history and literature and comparative religion such that people can learn about them and apply that knowledge to other things.

That's what our client has always strived to do. That's what the West Virginia Attorney General in a memo in 1983 said makes these kinds of classes during school hours permissible. And their clients --

THE COURT: Well, I understand all that. But your opponent says that if you look at the content of, of the program as it has existed, you fall short of that, don't you?

MR. DOREY: That is certainly something that we would dispute if this case would go forward except that these plaintiffs are not the appropriate people to bring that suit.

As I mentioned, of course, the Doe plaintiffs have never experienced this curriculum and never will. And the Roes have a claim for nominal damages at best.

THE COURT: What in your view is the impact on this case of the recent suspension of the program?

MR. DOREY: It has an impact insofar as it further illustrates why the plaintiffs had no standing when they filed their lawsuit, which is really the time that the Court

should be looking at; did they have standing when the lawsuit was filed.

The fact that the program could be put on hold and changed in the intervening months between when the complaint was filed and now fully illustrates that the complaint at the time it was filed was speculative.

But even further, it just goes to show that any lawsuit that would continue from here on out is only further couched in speculation because what lawsuit will we have? What will be adjudicated about a program that doesn't exist that hasn't been experienced by the Doe plaintiffs at all?

THE COURT: Well, you're putting all your eggs on standing. What -- do you have anything to say about the mootness and ripeness doctrines and how they might apply to this situation?

MR. DOREY: I think the mootness and ripeness question really comes about only when you've already determined that plaintiffs have standing to bring a case.

So if they have standing, then we can discuss questions of mootness and ripeness. But we don't think that we ever get to those questions because this lawsuit shouldn't have started in the first place and needs to be dismissed from the get-go.

As for the mootness question, if we're really going to get there, we think the case would be moot because the -- I

mean, we can represent and it is clear from media accounts that the curriculum that is complained about in the complaint is over and is not coming back.

THE COURT: All right. What else do you have?

MR. DOREY: If the Court was not inclined to find that plaintiffs don't have standing, we also believe that the complaint doesn't state a claim because it really asks for not an injunction as against the particular curriculum that used to be taught in these schools but, in fact, a broad injunction that would seek to end Bible teaching, teaching about the Bible in any form in Mercer County Schools.

And we don't think that that's -- that is not a cause of action. Plaintiffs have at that point pled themselves out of court. And for a while, they had denied that this was the case. But ultimately in their sur-reply brief, which was filed with the Court recently, they admit --

I would point the Court's attention to Document 33 on Page 6. They say, "The Bible cannot be taught in a constitutionally permissible manner to elementary school students."

This is what they're complaining about. That's why we're here today I think because even though the curriculum they complained about is over, they still want to maintain the suit because they're not really seeking an injunction

against the classes as they once stood, but really a sweeping broad pronouncement from this Court that Bible classes can't be taught.

We think that that flies in the face of decades of precedent and shouldn't be countenanced.

THE COURT: Well, I just told you -- I gave you two ways that it could be taught; outside school property during school hours and on school property after school hours.

MR. DOREY: That's true.

THE COURT: The Supreme Court's addressed both those things loud and clear.

MR. DOREY: Right, assuming that the curriculum was sectarian, it was religious education, which our clients have not attempted to --

THE COURT: I understand you don't admit that.

MR. DOREY: -- provide, and do not intend to provide in the future and have made clear that they're reviewing this curriculum to ensure that whatever is offered in the future complies with the rules.

THE COURT: Let me ask you about Dr. Akers. Under the *Monell* case she's out of this case one way or the other, isn't she?

MR. DOREY: We think so. They've attempted to sue her in her individual capacity, but the complaint is devoid

of particular allegations against what her -- in her individual capacity and, in fact, really mirrors a lot of the language that the Supreme Court said was insufficient in *Ashcroft* vs. *Iqbal*.

THE COURT: All she's doing is implementing the policy of the school board in her capacity as Superintendent of Schools. And under *Monell*, that shields her from liability, doesn't it?

MR. DOREY: We agree and so do plaintiffs because they changed their complaint as between the initial and the second removing the claims against Dr. Akers in her official capacity.

Now they've attempted to sue her in her individual capacity. But the fact of the matter is they have no allegations against her that are particular, but only sweeping conclusions.

THE COURT: Okay.

MR. DOREY: The same is true under *Monell* regarding the Mercer County Schools who are not a final policymaker. And, so, it's not clear why they belong in this lawsuit in the first place.

THE COURT: All right.

MR. DOREY: In addition, the Mercer County School Board, according to plaintiffs, has created this *Bible in the Schools* program by policy. But plaintiffs have failed

to identify a policy with particularity even though the Fourth Circuit says that's required in any complaint to state this kind of claim.

And, so, it should be dismissed for that reason as well or, in the alternative, for failing to meet the requirements of Rule 8 as articulated by the Fourth Circuit.

THE COURT: Do you think the law is clear that I have to decide the standing issue before I reach the mootness and ripeness questions?

MR. DOREY: I think that is a difficult question. But it is clear to me because standing is the, the predicate on which any lawsuit is based. If you don't have standing, then you cannot get to the next question because without standing, the lawsuit should never have begun.

The Court doesn't have subject matter jurisdiction and, so, cannot really reach out and grab the case and make a decision as to whether it is moot or whether there's a ripeness question. But if the Court disagrees, we'd be happy to have that discussion in more detail.

THE COURT: Well, you say there's no standing for Doe because he went to kindergarten and there's no guarantee now that he'll be exposed if he goes into the first grade to this program for a couple reasons because -- well, there's no certainty that he'll actually attend the first grade and there's no -- we don't know exactly what the content of the

program will be at that time.

MR. DOREY: That's correct. And, as a matter of fact, when he attends the first grade this August, there won't be a program at all because it's been suspended for at least a year while the curriculum is redone.

THE COURT: Well, he'll be in the second grade when the suspension is over and they have a new program, though.

MR. DOREY: He may, although that program may not be available in the second grade. It's not clear at this time. It's entirely speculative as for what the school board will decide.

THE COURT: All right. Thank you. I'll hear from Mr. Schneider.

MR. DOREY: Thank you.

MR. SCHNEIDER: Good morning, Your Honor.

I want to first address the characterization of the complaint as somehow being -- failing as a matter of law because it seeks too much.

It's very clear -- a review of the complaint makes very clear that this is a challenge to the *Bible in the Schools* program. The claim for relief is a separate animal that does not bear consideration in the Court's analysis of 12(b)(6).

The bottom line is the plaintiff is challenging this

program. The plaintiff will seek the broadest possible relief that the Court is willing to give. But the defendant is pressing the plaintiff to author that relief before this case even gets under way.

That's -- that will be in the hands of the Court, what relief is ultimately given, if any, in connection with this claim. And the defendant can point to no rules, Federal Rules of Civil Procedure that require the plaintiff to plead their relief in the manner that's being demanded in the defendants' briefing.

And, so, I just want to make clear at the outset that the plaintiffs are obviously charging -- challenging this particular program. And the relief that's requested will be decided as this case proceeds.

THE COURT: Okay. How does Jamie Doe have standing under the facts as they exist now? Normally you -- the Court decides whether it has jurisdiction based upon the, the case as pleaded at the time it's filed.

But the standing and mootness and ripeness are an exception to that rule, as I understand it. And changed circumstances can compel the Court to look at the new situation after the case is filed. And if I do that, you're in deep water here, aren't you?

MR. SCHNEIDER: Well, Your Honor, I'll take standing first because I think they need to be analyzed

separately.

I don't believe the standing analysis changes in any way based upon the actions of the defendant. Standing is analyzed as of the time the case is filed both to the, to favor the plaintiff as it might be if we're in hot water if we consider these change in circumstances and to the detriment of the plaintiff if the plaintiff later develops standing after a case is filed.

By filing the case, the allegations in the complaint essentially freeze in time what is being complained of. The curriculum -- a lot of emphasis by the defendants upon the curriculum. The complaint renders the curriculum static for purposes of standing. Standing only analyzes the ability of these plaintiffs to bring a case as of the time the case is filed.

And, so, none of these new facts that are brought into this case by the defendants change the nature of this claim as of the time it was filed.

Now, those facts may impact whether this case is ripe or whether there's a mootness problem in this case. And we did spend some time in our sur-reply filing, addressing the mootness issue.

When we look at mootness, the defendants have a steep burden to show that by voluntarily stopping this program, it is absolutely clear that this program will not start back up

again.

THE COURT: The, the burden to prove mootness is on the defendant. The burden to prove ripeness is on you, is it not?

MR. SCHNEIDER: Well, Your Honor, I think the ripeness burden would be on the plaintiff. And I think that -- just to finish the thought on, on mootness because I think it bears upon the ripeness issue, the defendants have failed to meet that burden on mootness for a number of reasons.

First, we have media accounts. That's really all that we have to deal with here on the action taken by the school district. And I don't think the parties or the Court should be put in a position of making a decision like this, a weighty decision like this based upon media accounts.

THE COURT: Well, it would be -- if the media is accurate, it would be a real simple matter for the school board to put those facts in evidence, wouldn't it?

MR. SCHNEIDER: Well, I suppose it would. But I, I think that precisely what the defendant plans to do in this one-year suspension is, is very important.

Some of the comments suggest that this is really a stall tactic; that the hope is to bring the program back; the hope is to include religious leaders in an effort to, to maintain as much religiosity as there is in this program

and, and move forward with it. At least that's what we're left to conjecture about when we only have media accounts.

But to, to assess the ripeness issue, I think we would really need to be able to conduct some discovery on that topic to understand exactly what the district's plans are with respect to this program. I don't think we can really guess at that based upon media accounts.

And I think the defendants would, would be -- would need to come forward with clear, a clearer picture of what the plan is so that the Court can assess the likelihood that this program will come back in some form either the same or very similar to its structure as of the time that the case was filed.

THE COURT: Well, in the *Abbott* case the Supreme Court set down a two-part test for ripeness. And the second part of that test was whether there would be hardship to the parties if judicial relief is denied at this point.

What hardship is there here to your clients if relief is denied at this point when once a new program is put in place, you can come back and file a new lawsuit?

MR. SCHNEIDER: Well, the, the harm is really the uncertainty which is, is, is not a small thing in these cases.

The plaintiff, Jamie Doe, filed this case basically as late as possible before entering into first grade if he were

to have wanted to obtain some preliminary injunctive relief to stop the program before the exposure.

And that's, that's a right that a plaintiff has. That's well established. A plaintiff can seek injunctive relief for future injury as long as that's --

THE COURT: That's the *Lee* against *Weisman* case that I talked about a minute ago I think.

MR. SCHNEIDER: Correct. And, so, by not being able to challenge the prospective program returning, the plaintiff will be likely forced to experience this, this program and the constitutional injury associated with the provision of, of this class.

THE COURT: So you're saying the hardship is the uncertainty attendant to not knowing whether there's going to be a program and what it's going to be like and so forth while he's in the first grade.

MR. SCHNEIDER: The uncertainty and the inability to challenge the program before the, the harm of being exposed as was sought initially when this case was filed.

THE COURT: Okay. What's the hardship to Jessica Roe? She's going to school in Tazewell County now, isn't she?

MR. SCHNEIDER: Yes, she is going to a different school. I'm honestly not sure which school, Your Honor.

So the, the standing analysis for the Roe plaintiffs

and the Doe plaintiffs aren't as -- is not as different as the defendants would suggest. The --

THE COURT: Well, my point, going back to the ripeness issue, is that the hardship you describe for Jamie Doe does not exist for Jessica Roe, does it? There's no uncertainty there if she's in school somewhere where there's no *Bible in the Schools* program and no threat that there will be.

MR. SCHNEIDER: Well, I think she would be similarly situated from the standpoint that the, you know, more time that goes by where she is not able to attend classes in her home district, the, the plaintiffs are basically put out. They are required to undertake these burdens because of the lingering uncertainty over whether this program will return and what changes will be made.

So the plaintiff -- in order to avoid the prospect of having to pull Jessica out of the district again if the program returns just as it is or with slight changes, those plaintiffs would be required to continue to take the avoidance steps being actively taken at this time in order to avoid that sort of yo-yoing back and forth that could result from making a decision to move her back to the home district only to then potentially have to remove her again.

THE COURT: Okay. How do you maintain your suit against Dr. Akers under the *Monell* doctrine?

MR. SCHNEIDER: Well, Your Honor, individual liability is available if there are actions taken by, --

THE COURT: I'm sorry. I interrupted you. Go ahead and finish your thought.

MR. SCHNEIDER: -- by the individual under the color of state law. And this program, long-standing program with Dr. Akers at the helm for a considerable amount of, of the time here, she is basically the mechanism through which this program is instituted and brought to the students.

And, so, in that respect, her individual actions are, are largely responsible for this program being brought to life.

THE COURT: I don't see how you get to that point if she in her official capacity is merely implementing a program that the school board has put in place. What has she done in her individual capacity that she hasn't done in furtherance of the policy of the, of the school?

MR. SCHNEIDER: Well, it's, it's the action under the color of law, under the color of state law. So, so -- under the color of the state. So it's certainly actions in her capacity as superintendent, but it is implementing and carrying out the program in that capacity.

THE COURT: Well, I don't think that gets you around *Monell*, but maybe it does. I'll take a closer look at it.

Going back to Jessica Roe, you haven't alleged in the complaint that she would come back to Mercer County if this program is done away with, have you?

MR. SCHNEIDER: We have not, Your Honor. And I don't think that that's necessary. I think it's absolutely unrealistic to expect a plaintiff to do that earnestly.

Part of the problem is, you know, a lot of the challenge here is that the plaintiffs haven't said the magic words. And I'd ask the Court to look past that and, and consider the substance of what's being alleged here.

It's not realistic to, to require Elizabeth Deal to consider every possible way in which this case might be resolved to make a decision preemptively on speculative circumstances about whether Jessica would return to the district. It's enough that she is, as it currently stands, deprived of the ability to do that without consequence in her home district.

And, so, you know, I think from the complaint it's clear that there's a, a strong objection to the offering of these classes leading to removal from the classes and eventually removal from the district to, to avoid those classes.

And I think the, the inability to freely without consequence send Jessica to her home school district is sufficient. Whether -- depending upon the nature of the

relief in this case, Elizabeth would make the decision to send Jessica back, I don't think any person could reasonably speculate about, you know, whether that decision would be made in a particular way given the uncertainty as to the precise nature of the relief.

THE COURT: Well, the fact that that's all speculative cuts against you more than it does your opponent here, doesn't it?

MR. SCHNEIDER: I don't think so, Your Honor. I think the, the defendants have conceded that if Jessica were in the district still and opting out of the Bible class that she would have standing.

This is only really a difference of degree moving from removal from the class to removal from the district to avoid the adverse consequences of opting out of the class.

So this is really no different than if -- this is no different than, in any meaningful way as far as standing is concerned, from if Jessica were still in the district. It's just a different type of avoidance.

And she should be able to freely have the choice to either re-enroll in her home district or stay in the other district without the influence and without the impact of these, these courses upon that decision.

THE COURT: Okay. Jamie Doe's parent or guardian is a member of your corporate plaintiff, the Freedom From

Religion Foundation. It's my understanding, and maybe I'm incorrect, that Jessica Roe's parent or guardian is not. Is that right?

MR. SCHNEIDER: That's correct, Your Honor.

THE COURT: Well, doesn't that knock the Freedom From Religion Foundation out of the water with regard to the claim of Jessica Roe? Doesn't the -- doesn't a plaintiff here have to have -- I mean for, for Freedom From Religion to be a proper plaintiff, don't they have to have a member involved?

MR. SCHNEIDER: That's correct, Your Honor. And, so, that member -- the only member as the case is, is currently structured is Jane Doe. So the, the organizational standing rises and falls with the Doe plaintiffs.

THE COURT: Okay. So Jessica Roe, I guess, could still be a party in her own right but not a representative of the Freedom From Religion Foundation. Is that right?

MR. SCHNEIDER: That would be correct. And theoretically, Your Honor, I guess if the nominal damages claim that you talked about briefly with the defendants were to remain in the case, that would be the case, and if I could speak just briefly to that claim.

The *Covenant Media* case in the Fourth Circuit, while not resolving this issue, certainly hints at nominal damages

being sufficient. And there are some cases cited in that case that do the same. This really is an unresolved issue.

And, so, I think it's, it's important to look at Justice O'Connor's concurrence in the *Farrar* vs. *Hobby* case for some guidance on this issue. And Justice O'Connor observed that in certain cases, nominal damages are more meaningful than in other cases.

The issue there was whether a party was a prevailing party under 1988 for attorney's fees. And, and Justice O'Connor's observation was that in that particular case where the plaintiff sought $17 million from a slew of 10 or 11 defendants and got one dollar from one defendant, that party was not a prevailing party under 1988. But the analysis made reference to consideration of the meaningfulness in a particular situation of nominal damages.

The reality in these sort of cases involving psychic and spiritual injury is that a plaintiff is typically not able to show damages from a compensatory standpoint. And, so, in these cases there is much greater meaning to nominal damages than in a case where compensatory damages are sought. And sort of a fall-back position is, well, you know, there was liability and, you know, we'll give you six cents.

THE COURT: If, if I agree with you that Jessica Roe has a claim for nominal damages, does that require me to

go into the thicket of looking at this program and making a judgment as to whether it's sectarian or non-sectarian?

MR. SCHNEIDER: I think if, if Jessica or --

THE COURT: If the Court says it's non-sectarian --

MR. SCHNEIDER: If Jessica Roe's claim with standing I think -- claim went forward, I do think that the, the whole of the considerations involved here --

THE COURT: I'd have to look back at the program the way, in its form at the time she was a student in the school, wouldn't I?

MR. SCHNEIDER: For nominal damages, yes, Your Honor.

THE COURT: Okay. What else do you have?

MR. SCHNEIDER: Just my final note would be on the issue of -- unless Your Honor has anything else from me, my final note would be on the issue of municipal liability of, of the Board.

We cited to case law and I think it's fairly clear that you can proceed under a custom, policy, or a decision of a final policymaker where neither of those two exist. It's, it's a disjunctive situation. It's not that you must point to a particular decision by a particular final policymaker in all cases.

There's very clearly at an absolute minimum a custom

here of this course to the tune of 75 years of history, 30 years in its current iteration. And we think it's very clear that the Board of Schools has approved of this program and implemented this program.

And through the general policies of implementation of curriculum we pointed to and the long history of the program, we think that we've more than met the pleading standard for a municipal liability claim against the, against the school.

THE COURT: Okay. Thank you, Mr. Schneider.

Mr. Dorey, do you want to respond to any of that?

MR. DOREY: Yes, please, Your Honor.

You heard from Mr. Schneider during his argument a lot of phrases that really go to indicate that his plaintiffs don't have standing to bring this case. He said things like being likely forced to experience something in the future, a harm -- he said the harm is the uncertainty.

These only further indicate that we cannot have a case when plaintiffs haven't experienced something that now doesn't exist. These folks didn't have standing from the get-go. They don't have standing now. Their case must be dismissed.

A couple of follow-up points, especially with respect to the question of Jessica Roe. Plaintiffs during argument said that so long as Jessica Roe and her mother have the

power to re-enroll her in school essentially that there is a live case here and the Court can adjudicate an injunction.

This contradicts the Supreme Court's opinion in *Lewis* vs. *Continental Bank Corp.*, which we cite in our papers, Document 26 at Page 18, 494 U.S. 472 at 479.

THE COURT: It's within the rule of *Doremus* too, isn't it? It's been the law since 1952. In that case the student graduated before the case came to, came into the court. And isn't that similar to the fact that this student isn't in the school anymore?

MR. DOREY: It is similar although slightly different because that student probably couldn't come back. It is in theory possible that Jessica Roe could come back to school. But the Supreme Court has held the mere power to do something again is not an indication of an intent to do so.

And unless you have an intent to do so, you cannot get declaratory and injunctive relief because the plaintiff, quote, "must establish that it has a specific live grievance."

The amended complaint goes out of its way to plead that the *Bible in the Schools* program was a reason that Jessica Roe was placed in school elsewhere, leaving one to believe or to question what are the other reasons.

If the *Bible in the Schools* program was the only reason she went to school somewhere else, it should be pretty easy

for these folks to say if the *Bible in the Schools* program is changed or different or gone, then we will -- we intend to re-enroll Jessica. But they refuse to say that which really is fatal to their claims.

THE COURT: Let me ask you this. Can I consider the fact that -- appears to be a fact that this program has been suspended and it's under review when -- or am I stuck with the record I have before me?

MR. DOREY: I don't believe that you're stuck with the record before you. And, in fact, we have made a record in our reply brief that explains to the Court what is going on presently.

I believe we're allowed to do that because we've essentially said plaintiffs don't have standing and the allegations in the complaint aren't true at least as of now.

This, this idea that the facts in the complaint are static as for standing, I'm not certain that plaintiffs are able to point to any case that says that that's so. In their papers I don't see it.

Certainly you would evaluate standing as of the time that the complaint was filed. But the fact is the changed circumstances indicate that they didn't have standing as of the time the complaint was filed.

So I think we need to look at the whole thing to then decide whether when this complaint was filed in January

initially as for the Doe plaintiffs whether they had standing then. They didn't because their claims were speculative at that time. They're speculative then and they're speculative now, even more so now.

THE COURT: Well, the nominal damage claim is not speculative because assuming that Jessica Roe wins on the merits and this is a religious -- unconstitutional religious program and she was exposed to it, then that's a concrete injury however slight, isn't it?

MR. DOREY: It may be an injury, but I don't know that it's justiciable because it doesn't meet the third prong of the standing test which is that whatever comes out of a lawsuit, redress an injury.

And I'll refer the Court to *Utah Animal Rights* vs. *Salt Lake City*, 371 F.3d 1248 at 1264, also in our papers at Document 26, Page 19. This is Justice McConnell concurring.

"Nominal damages are damages in name only, trivial sums such as six cents or one dollar. They do not purport to compensate for past wrongs. They are symbolic only. The question, as with declaratory judgment actions involving past conduct, is whether an award of nominal damages will have practical effect on the parties' rights and responsibilities in the future. A declaratory judgment action involving past conduct that will not recur," as here, "is not justiciable. Labeling the requested relief nominal

damages instead of declaratory judgment should not change the analysis."

THE COURT: What case is that?

MR. DOREY: This is *Utah Animal Rights Coalition* vs. *Salt Lake City Corp.*, 371 F.3d 1248 at 1264 through 1266, Tenth Circuit 2004; in our papers ECF Number 26 at 19 to 20.

THE COURT: That's a Tenth Circuit case?

MR. DOREY: That's correct.

THE COURT: That's not binding on me, but I can give it such authority as I think it deserves.

MR. DOREY: That's right. We believe it's highly persuasive as is the concurrence in the Third Circuit involving FFRF, as is the Second Circuit case *Kerrigan* vs. *Boucher*, 450 F.2d 487, 489 to 490.

THE COURT: The only recent Fourth Circuit case is the South Carolina case; right? And that's -- that really doesn't help us much because that *Bible in the Schools* program was taught off school property.

MR. DOREY: That's correct. And in that case, it's really a mootness analysis. Once a case has gotten going, if it turns out that actual damages fall away, then we're not going to get rid of the case for that reason alone.

There's really with mootness, I think, a question of

some costs; let's go ahead and finish. But if you're admitting from the outset of a case that you don't have damages, then the case should never begin. And I agree with plaintiffs that this is not settled in the Fourth Circuit, but we would like to settle that question.

THE COURT: Okay. Let's take a break. I want to talk to my lawyer here before we complete this hearing. So we'll be in recess for a few minutes.

(Recess taken from 10:45 a.m. until 10:52 a.m.)

THE COURT: Mr. Dorey, I have one other thing I want to pursue with you.

MR. DOREY: Yes, Your Honor.

THE COURT: You're saying that the Doe plaintiff doesn't have standing because he hasn't enrolled in school and been subjected to this program. The program's been in effect since 1986 in its form it was in before it was suspended if I understand the facts correctly.

MR. DOREY: That's what plaintiffs have alleged to my understanding.

THE COURT: Yeah. Well, doesn't that make the, the injury imminent enough for him to have appropriately brought this suit even though he hasn't actually been in school under the program?

There's just a short window of time here before it looks like he will be exposed to this -- would have been

exposed to this program had it not been for this lawsuit. And does, does he have to wait until he's actually injured to bring the case for an injunction or can the impending injury give him standing to try to avoid that injury by getting an injunction?

MR. DOREY: He could file a lawsuit ahead of the injury. That much is clear. But the Supreme Court has also made clear that the injury must be certainly impending. And if it's not certainly impending, then it's not sufficient of an injury and doesn't confer standing to get to court.

Certainly I would refer the Court to *Beck* vs. *McDonald*, a Fourth Circuit case of this year, 848 F.3d at 276 discussing the Supreme Court's decision in *Clapper*.

"We read *Clapper's* rejection of the Second Circuit's attempt to import an objectively reasonable likelihood standard into Article III standing to express the common-sense notion that a threatened event can be reasonably likely to occur but still be insufficiently imminent to constitute an injury-in-fact."

THE COURT: But they're not threatened now because of the suspension of the program assuming that that matter is before the Court properly which is not entirely clear.

MR. DOREY: Correct. And the fact that the program could be suspended and changed in the time in between which the lawsuit was filed and when the student

would have experienced it just goes to show all the more fully that it was speculative because it could have been changed because school programs' curriculum are changed all the time.

We've pointed in our briefs to good authority that says school principals and teachers on the regular reconsider curriculum. There's West Virginia law that requires that to happen.

So it's no surprise that this could be reviewed, would have been reviewed, will be reviewed. I think that for this plaintiff to have standing, he needed to wait longer to be about to, imminently to experience the program, file a lawsuit, and file, if he wanted to at that time, for a preliminary injunction.

THE COURT: Okay. Let's go back to the point we touched on a moment ago. Do I have to decide the standing issue based on the status of the case as it was originally filed or can I look at changed circumstances?

MR. DOREY: I believe that you can look at changed circumstances at least to illustrate further that plaintiff did not have standing at the time he filed his lawsuit. And I do not believe that plaintiffs can point to any case that says that the Court cannot look at changed circumstances to evaluate that question.

Certainly, standing is evaluated at the time the

lawsuit was filed. But those changed circumstances here illustrate why the plaintiff didn't have standing from the get-go.

I also think that there are ways to lose standing as lawsuits go on. But here I don't believe that standing ever attached in the first place. So we don't need to go there.

THE COURT: Okay. Let me hear from Mr. Schneider. Do you want to address anything on this limited subject that I just brought up with Mr. Dorey, Mr. Schneider?

MR. SCHNEIDER: I do, Your Honor.

To respond to the statement that plaintiff hasn't pointed to any case law to support the argument that the complaint renders the facts static for purposes of standing, I would respond as follows.

It's very clear, and the parties agree, that standing is considered as of the time a case is filed. There's ample case law where plaintiffs didn't have sufficient contact with an unwanted religious display or exercise at the time the case was filed, had contact with the display or exercise after the case was filed, and attempted to bootstrap that later conduct into standing at the outset. That's been rejected because standing is evaluated at the outset.

THE COURT: Do you have those cases in your brief?

MR. SCHNEIDER: I don't, Your Honor. I, I could probably in a couple minutes come up with one, but I know

from prior cases that there are ample cases where that's the case.

And I, I don't think that the defendants would dispute that if -- for example, Your Honor, if, if a delay had occurred in this case and we were not having this hearing prior to the start of the next school year, I don't think the defendants would say that the plaintiffs' argument for standing now considers the fact that Jamie Doe experienced a day or a week or a month of the program. They would force the plaintiffs to be frozen in time as of the time the case was filed.

I see no reason the defendants should be treated any differently. Both of -- both obligations to either side arise from the simple notion that standing is considered as of the time that a case is filed.

The other problem with allowing the consideration of new facts is that it runs afoul of all of the developed case law on voluntary cessation and how that is considered under the mootness doctrine where defendants have a heavy burden to show that a challenged exercise will not -- is absolutely clear it will not happen again.

What the Court would be inviting by distinguishing this situation from voluntary cessation situations is saying, "Defendants, if you cease your conduct voluntarily soon enough, i.e. before you're out of the pleading stage, well,

we'll consider it under a totally different standard understanding. But if it's after the pleadings close, well, now you have this uphill battle to show that it's absolutely clear it will not happen again under the mootness doctrine."

The same rationale that applies to holding the defendants to that standard under mootness and voluntary cessation applies now as well. You would otherwise create an easy out for defendants to get in these sort of file, change the conduct, renew the -- after the case is, you know, dismissed, renew the conduct again. Precisely the thing that voluntary cessation case law seeks to avoid you would be inviting by allowing for a different standard if you make the change before the pleadings close.

The last point I would make is on the issue of Jamie Doe not being -- the, the injury not being sufficiently clear. I think it's, it's necessary to understand the implications of the defendants' argument on that which would essentially be plaintiffs can really not meaningfully challenge curriculum under the Establishment Clause if the defendants' argument is to be accepted that curriculum can be changed all the time.

The argument's especially disingenuous in this case given the long history of this program. And, so, I think it's clear student plaintiffs are entitled to challenge school curriculum in their schools long enough that seven --

a mere seven months before they're going to encounter that curriculum, especially when there's such a long-standing curriculum as there is here.

Thank you, Your Honor.

THE COURT: Thank you.

All right. I'll take this matter under advisement and decide it as promptly as I can. I thank you gentlemen. This was very helpful to the Court and I appreciate your help.

(Proceedings concluded at 11:00 a.m.)

I, Lisa A. Cook, Official Reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

s\Lisa A. Cook — January 2, 2018

Reporter — Date